No. 15738

See also Vol. 3081

United States
COURT OF APPEALS
for the Ninth Circuit

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

Appeal from the Judgment of the United States District Court for the District of Oregon.

WALTER H. EVANS, JR. and
BURTON J. FALLGREN,
Public Service Building,
Portland, Oregon,
Attorneys for Appellants.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 5-59

SUBJECT INDEX

CASE INDEX

No. 15738

United States
COURT OF APPEALS
for the Ninth Circuit

JAMES BUTLER ELKINS and
RAYMOND FREDERICK CLARK,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

Appeal from the Judgment of the United States District Court for the District of Oregon.

TO THE CIRCUIT JUDGES, THE HONORABLE MATHEWS, CHAMBERS and HAMLIN, Judges of the above entitled Court:

Come now the appellants, and each of them, and respectfully petition the above designated Circuit Judges (or in the event this matter should be reheard en banc, the Judges of the above entitled Court), for a rehearing of their cause and their appeal, and in support thereof allege that this Court erred in its opinion and judgment filed herein on April 27, 1959, in the following particulars:

1. In failing to pass upon the question of whether or not evidence illegally seized by State officers can be used as the basis of a Federal prosecution.

2. In considering the question of whether the Federal search and seizure herein was lawful, and in the event this question was properly before this Court, in determining that the Federal search and seizure was lawful.

3. In failing to pass upon the question of whether a State court could validly follow and enforce the doctrine announced by the Supreme Court in Rea v. The U. S. (350 U.S. 314).

4. In holding that specifications of error No. 12 (action of the lower court in compelling the State officers to testify under threat of contempt) was not properly before this Court and in finding that there was no merit to specification No. 12.

5. In determining that specifications of error Nos. 4, 5, and 6, were not set forth as required by this Court's rules and in further finding that there was no merit in such specifications.

6. In determining that the evidence herein was "amply sufficient," or sufficient at all, to sustain the conviction of each defendant on Counts I and II of the indictment without passing upon the question of whether or not there was an "interception."

7. This Court erred in failing to reverse the conviction of defendants on all counts.

ARGUMENT

Point 1. The Court erred in failing to pass upon the question of whether or not evidence illegally seized by state officers can be used as the basis of a Federal prosecution for the reasons that (a) this Court cannot determine the legality of the seizure of the evidence in a vacuum, and this Court ignored (b) defendants' contention that the state officers seized the evidence for the purpose of enforcing Federal law, and (c) defendants' contention, and the evidence indicating, the "common practice and general understanding" between Federal and state officials by which evidence obtained by state officers indicating a Federal violation would be turned over to Federal officers for prosecution, and (d) the fact that the tapes, when they were seized by the Federal Government, were actually being held by order of a State Court of competent jurisdiction.

This Court, in its opinion (page 8) stated that since the record below shows that there was no participation by Federal officers in the state search and seizure of May 17, 1956, hence, "the question of the lawfulness of the State search and seizure need not be considered." No one has ever contended that the FBI was lurking in the dark outside Ray Clark's home the night it was broken into on May 17, 1956, the night on which the 5 rolls of tape were stolen from his home. This Court, however, has overlooked the fact that the Trial Judge

stopped the defendants from fully inquiring into whether or not there was a valid basis for the Federal search warrant, or whether or not the FBI records would reveal any prior complaint or understanding. His reason was that he considered the question of the validity of the Federal search and seizure **completely immaterial.** The Court's lengthy ruling on this point was quoted in its entirety at pages 44 to 50 of Appellants' brief. At the risk of being repetitious, we will again emphasize certain portions:

First we will quote a portion of the Government's position which appears (at page 313 M.S.)[1] immediately before the quotation in Appellants' brief.

MR. LUCKEY:

> " . . . I submit that if there had been no search warrant at all, if these documents had been turned over to the federal authorities on a silver platter by the state officials or had the Government received them in some other manner that did not go to the original illegality, if it was illegal, of the original search and seizure these defendants would be in no position to complaint. . . ."

Again, at the bottom of the page 316 and the top of 317 (M.S.), the Court restated the Government's position as follows:

> "THE COURT: In other words, I take it it is your position that this Court's inquiry is not

[1] M.S. refers to the transcript on the Motion to Suppress; Tr. refers to the Transcript of Testimony; Tr. of Rec. to the Transcript of Record, Vol.I.

whether or not—it makes no difference whether or not the federal seizure was pursuant to a valid search warrant.

MR. LUCKEY: That's right. Because I suggest, your Honor, that under the cases if the state authorities who first themselves conducted the illegal search and seizure had handed them over on a silver platter to the federal authorities they would have been admissible. . . . ."

The Court then ruled (at page 321 M.S.):

"THE COURT: Well, I am forced to decide it. I have been listening to all of the testimony and I have reached this conclusion: That it does not make any difference in the ultimate end of this matter whether or not the FBI had a valid search warrant in Mr. Sherk's possession at the time he took possession of the tapes; that if his taking possession is illegal, it has to be on some other grounds under the theory of defendants other than the fact that he held an illegal search warrant. . . ."

And finally the Court stated (at page 323 M.S.), in explaining its ruling to counsel:

"THE COURT: Well, for the instant it would prevent you from further inquiring as to the basis of knowledge—the basis of Mr. Sherk's knowledge or lack of knowledge in executing the affidavit for the search warrant. **This Court doesn't care from here on out whether he ever executed an affidavit for a search warrant."** (Emphasis added)

At page 328 (M.S.) the defendants requested the production of the reports made by FBI agent Sherk with reference to these tape recordings, and finally on page 336 (M.S.) the request was denied.

(See also the initial request made at pages 180 to 183 M.S.)

It was and is the defendants' contention that the FBI agent Sherk, at the time he made the affidavit for the Federal search warrant, knew that the tapes were "stolen" tapes,—in that the State Court had already allowed the motion to suppress and held the tapes to have been illegally seized. When counsel started to inquire as to whether or not he knew that the proceedings to suppress the evidence was pending when he first heard the tapes, the Court sustained the Government's objection that it was irrelevant (M.S. 197):

> "MR. CRAWFORD: Question: Did you read the newspapers in regard to this matter on Monday, May 21, 1956?
>
> Answer: Yes, I read the newspapers about this matter every day.
>
> Question: Every day?
>
> Answer: Every day. . . .
>
> Question: Now were you aware at the time you heard the tapes that there was pending in the District Court of Multnomah County, Oregon, a proceeding to suppress certain evidence seized from the residence of Raymond Clark?
>
> MR. LUCKEY: If the Court please, I would object to that as immaterial and irrelevant.
>
> THE COURT: Yes, it is irrelevant."

The matter was discussed between Court and counsel and again at pages 213 and 214 (M.S.) and the Court reiterated its former ruling.

We cannot comprehend by what logic this Court concludes that Clark's undisputed right of posses-

sion which he was enjoying in his home on May 17, 1956, is transmuted into an apparent consent (or at least lack of power to object) to the FBI agent's seizure of these tapes on Sept. 5, 1956. We respectfully urge, and represent, as counsel of this Court, that had the agent been permitted to answer the question and the ones which would have followed, that he would have stated that he was well aware of the fact that the State Court had previously granted the motion to suppress and had ordered the tapes impounded by the Attorney General and that it was from the State Police, who were holding them for the State Court and the Attorney General, that he learned the whereabouts of the tapes on September 5th, 1956.

If a thief cannot pass title to stolen property, how was Clark's right of possession in these tapes disrupted or disturbed? The Government has never challenged **Clark's** right of possession in these tapes nor his claim of proprietary ownership. (See the Government's brief, pages 30 to 32.) The Government contended that Elkins had no standing to object because he had "only indirectly asserted" ownership of the evidence. While we cannot agree with this Court's interpretation of the effect of the statement in defendants' motion of March 25, 1957, —that **it was restricted to the date the motion was filed,** this Court is in error when it states the record does not show that on September 5, 1956, the defendants "owned or had any proprietary interest in the property seized" (Opinion of this Court, p.

9). In the first place their title or claim of ownership had never been disputed, and in the second place in the record defendants **unequivocally** claimed proprietary ownership of the tapes; the following is quoted from the transcript on the Motion to Supress, at page 286:

> "THE COURT: Well, now, let me ask you the direct point. In your motion to suppress you assert a proprietary ownership in the tapes now in the custody of the Court?
>
> MR. CRAWFORD: **That's right.**
>
> THE COURT: Taken under the State's warrant. **You don't repudiate that, do you?**
>
> MR. CRAWFORD: **No.**" (Emphasis added)

This Court has placed these defendants in the following position: The trial court held it was immaterial whether there was a federal search warrant (or affidavit therefor) and therefore precluded the defendants from: (1) trying to show whether or not there was Federal participation; (2) whether or not there was probable cause for believing the existence of the grounds on which the Federal warrant was executed; and (3) whether or not the Federal warrant was void. It did this under the "silver platter doctrine." This Court, in the face of the record showing a written motion in which the defendants claimed to be the owners of the property in question, and in the face of the direct statement by counsel in open court that they claimed proprietary interest in the property, and in the face of the record showing that the tapes were originally seized from Clark's home after his

home had been broken into, **is now holding that the defendants have no standing to challenge the lawfulness of the search and seizure,** and now holds that the Federal search and seizure were lawful! How can the illegal breaking, entering and seizing of personal property destroy the defendants' claim of ownership, or Clark's right of possession?

We believe that **if** the Silver Platter doctrine is still the law (which we deny), it certainly is premised on the lack of participation in, and lack of knowledge of, any illegality on the part of the state officers. It is true the record does not show this pre-existing knowledge on the part of the Federal officers for the reason that the defendants were precluded by the Court's ruling from interrogating the witnesses on this point. This being so, we respectfully submit that the Government's case **must** rise or fall on the validity of the state search and seizure, even if this Court does not choose to follow the Court of Appeals for the District of Columbia in Hanna vs. U. S. (260 F.2d 723). The Government, for purposes of the Motion to Suppress, conceded the illegality of the state seizure (M.S. 84).

Argument on Point 2:

This Court erred in considering the question of whether the Federal search and seizure was lawful. We will not reiterate the argument contained above. This Court passed on a question that was **never determined by the Court below** and its theory is

diametrically opposed to that of the lower Court. The lower Court stated it was immaterial whether any Federal process had been issued since the agent received the property on a Silver Platter. In fact it was stated both by counsel and the Court that for purposes of the motion it could be assumed both that the Federal search was illegal and the state search illegal:

> (M.S. 84) MR. LUCKEY (discussing the state search and seizure): "I think we can take the position, Your Honor, without saying that we either accept or disbelieve that it was or was not an illegal search and seizure, **that for the purpose of this matter we may treat it as illegal.**"
>
> (M.S. 316) MR. LUCKEY: "I don't suggest, Your Honor, that the validity of the Government's present possession depends on the (federal) search and seizure as to these defendants. . . . ."
>
> (M.S. 317 MR. LUCKEY: "These are subsequent matters of getting them that are **mere formalities** and serve to get them and perhaps by a **more delicate and discreet** manner. But as to the necessity of sustaining the search warrant, I don't for one minute suggest that it isn't a valid search warrant. But my point is that we are wasting time on an inquiry that isn't relevant." (Emphasis added)

The Court's rulings are quoted supra, p. 5.

The District Court did **not** deny defendants' motion to suppress on the ground that the defendants had no standing in court to question the validity of the Federal warrant—**it never got to that point** since it held that the validity of the Federal

warrant was irrelevant and made no findings thereon (M.S. 520). This being so, we fail to see how this Court, on an incomplete record, can find the Federal search was valid.

Assuming that the question is properly before this Court, then this Court erred in determining that it was valid because as pointed out above and as tacitly admitted by the Government in the Court below (see supra, p. 10, "mere formalities"), the Federal process was a sham procedure to give the Government a color of law in its possession. Does this Court really believe that the Government needed a search warrant to obtain the tapes from the Bank at Milwaukie? Is this Court so naive as to believe that either the state police or the bank manager would not have responded to a Federal subpoena to produce these tapes before the Federal grand jury? Is it not obvious that the sole purpose of the Federal search warrant was to seek to avoid the perils of the doctrine of custodia legis?

With all the sincerity at our command, we respectfully suggest that Constitutional guarantees should not be dissipated by a sham proceeding by the United States Government (**McGinnis vs. the U. S.,** 227 F.2d 598; **U. S. vs. Dixon,** 117 F. Supp. 925; and **Gilbert vs. the U. S.,** 144 F.2d 568).

In the **McGinnis** case (227 F.2d 598) the Federal agent accompanied the State Police to the premises in question and on the basis of this visit, executed an affidavit for a search warrant. The Court stated:

> "A Federal agent cannot participate in an unlawful search and then on the basis of what he observed in the course of that search, and on that basis alone, go to a United States Commissioner and swear out a search warrant. Such a search warrant, and the evidence procured in the course of a search thereunder would merely be the illegal product of a previous unlawful search by Federal authorities." (Citing cases)

The difference between the **McGinnis** case and the case at bar is that here the State authorities delayed their invitation to the Federal authorities, until **the next judicial day after the search.** Does this lapse of time destroy the Constitutional guarantee? Such is the holding of this Court in the case at bar. It is respectfully urged that the possession of the FBI, by means of the Federal warrant, had no more legal effect than the taking possession of stolen property from a thief. The original taking of possession of the tapes by the State officers was an unlawful seizure. What alchemy has dissipated defendants' constitutional right to object? What made it **lawful** possession in the bank or in the Government?

We feel we should comment on this Court's apparent position that the motion of March 25th did not comply with the provisions of Subdivision (e) of Rule 41. We are compelled to call the Court's attention to the provision of Rule 2 of the Federal Rules of Criminal Procedure which, although not adopted by this Court in its rules, is made applicable to this Court by virtue of Rule 54 (a):

> "(1) COURTS These rules apply to all criminal proceedings . . . in the U. S. Courts of Appeals; . . ."

The purpose of the rules (Rule 2) is to "provide for the just determination of every criminal proceeding" and "they shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay."

We respectfully point out that the motion of March 25th was specifically upon at least one of the grounds set forth in Subdivision (e) of Rule 41, and therefore the Court erred when it stated that the motion was not based on **any** of the five grounds therein specified. If the Court will examine the motion (Transcript of Record, volume 1, # 13, pages 46 to 49) the Court will see that paragraph (b) was "that the search warrant used by said agent or agents of the Federal Bureau of Investigation of Sept. 5, 1956 in seizing said property is and was invalid, illegal **and void** in that it is and was based on an insufficient affidavit of one Ronald E. Sherk, an FBI agent . . . **and that there was not therefore probable cause for the issuance of said warrant.**" (Emphasis added) Is this language not sufficient to advise the Government and this Court that it was urging a violation of at least Subdivision (4) of Paragraph (e) of Rule 41, if not also Subdivision (2)?

More important than the foregoing, is the Court's intimation that somehow the Federal Rules

of Criminal Procedure have circumscribed the Constitution of the United States and prevent the defendants from raising a Constitutional question. The defendants have always contended and still contend that the use by the Federal Government of illegally seized state evidence violates the 4th and 5th Amendments (Appellants' brief, pages 55 to 62). We will not reiterate the argument heretofore advanced on this point, but we do point out that this Court has ignored it.

We also note that this Court in its opinion (page 9) found it significant that the defendants did not ask for a return of the property to them. We can only point out that had the defendants asked for a return of the property to them, they would have been in contempt of two State Court orders directing that the tapes be turned over to and retained by the Attorney General (Tr. of Rec. p. 65, p. 68). Furthermore, is this Court intending to hold that a Constitutional guarantee would be protected if the accused said, "Please suppress this evidence and return it to me," but is **not** protected if the witness merely said, "Please suppress this evidence"?

Arguments on Points 3 and 4: The Court erred in failing to pass on the question of whether or not a State Court could validly follow and enforce the doctrine announced by the United States Supreme Court in **Rea vs. U. S.**, 350 U.S. 314. This Court erred in treating this as a question of **admissibility** of evidence.

In its opinion (page 10) this Court has stated that it need not consider specification 12 because this specification does not comply with Rule 18, apparently referring to setting forth the "full substance" of the evidence admitted. In the first place the question did **not** relate to the relevancy or materiality of the testimony but whether or not the witnesses should be allowed to give **any testimony at all** concerning what they learned on the night of the illegal raid. The question was raised by objections interpose by the testimony of 7 separate witnesses, and a rough calculation would indicate that the testimony adduced over defendants' objection occupied something more than 800 pages. Surely the Court does not require a defendant to encumber his brief with some 800 pages of quotation of testimony at an additional cost of at least $3,000 in order to raise this question. Indeed, a summary of the testimony of these witnesses (which does not purpose to contain the "full substance") occupied more than 25 pages of the Appendix! Would the inclusion of 25 or 30 additional printed pages summarizing their testimony have aided this Court in determining the question before it?

We apologize for not quoting the precise question and answer on which it was first raised and do so now. There had been considerable discussion between the Court and counsel as to the effect of the restraining order and the restraining order had been read to the entire jury panel as shown in Ap-

pellants' brief at page 74 (Tr. 2 to 28). When the first state officer was called, he was asked the question (Tr. 569):

> "Question (by MR. LUCKEY): Now, Mr. Mineally, in connection with your duties as a deputy sheriff, did you have occasion on or about May 17, 1956, to visit the home of Raymond F. Clark?
>
> MR. EVANS: Objection, your Honor, that is one of the matters that is covered in the State Court Restraining Order.
>
> THE COURT: It will be overruled.
>
> MR. EVANS: I would like to be heard on that, Your Honor.
>
> THE COURT: Do you have any new grounds other than what have been discussed?
>
> . . .
>
> MR. EVANS: Then all the other grounds we have urged.
>
> THE COURT: Very well. The motion is overruled."

Immediately following this, Mr. Crawford joined in the objection and the Court likewise overruled it (Tr. 570).

The Restraining Order was considered by this Court when Appellants' Petition for a Stay to enable them to file a Petition for a Writ of Prohibition (undocketed petition opinion rendered per curiam from Judges Stephens, Pope and Lehman under date of April 22, 1957, in which this Court stated, in part:

> "As for petitioners, their right of appeal from any judgment of conviction will afford them an adequate opportunity for Appellate review of such rights as they may have to an exclusion of this evidence. We are not now required

to express any views as to their right in that respect. . . ."

We respectfully submit that this specification of error and this point **is** properly before this Court, and that since this precise question was reserved by this Court in the case of **Rios vs. the United State** (256 F.2d 173), that it merits more than the statement, "However, we have considered them and find no merit in them."

We repeat from our main brief: If the Federal Court has the power to enforce Federal policy on Federal officials by enjoining them from taking part in a state prosecution (**Rea vs. U. S.,** 350 U.S. 314), cannot a state court enforce the identical state policy with respect to state officers when they participate in a Federal prosecution? If the question before the Supreme Court in **Wolf vs. Colorado** (338 U.S. 25) was, as stated by Justice Frankfurter, whether or not the state might adopt a substitute for the exclusionary rule without running afoul of **minimal** standards, cannot the state enforce the same right as that of the Federal Government?

Argument on Points 5 and 6: The Court erred in determining that specifications of errors 4, 5 and 6 were not properly before this Court and that they were without merit. Specifications 4, 5 and 6 related to the District Court's charge to the jury. They, and defendants' exceptions, were set forth totidem verbis, at pages 100 to 109 of Appellants'

brief. Immediately following these specifications of error, we inserted a preliminary statement (Appellants' brief page 95) pointing out to the Court that the instructions given, requested, and the exceptions thereto, were quoted in their entirety at pages 100 and 103. If this Court, by its decision in the case at bar, means that in every criminal case in which a question of as instructions was raised, the appellant should set forth the **entire charge** of the Court to the jury totidem verbis, then we believe this Court should so state in its rules. Rule 18-D of this Court states in part, "When the error alleged is to the charge of the Court, the specifications shall set out **the part** referred to totidem verbis, . . . together with the objections urged at the trial . . ." In all fairness we believe we have complied with this rule, and if the Court is annoyed for the inconvenience of six pages intervening between the listing of the specification and the beginning of the instructions, we apologize for such annoyance and inconvenience. It had been our fond hope that setting them forth in this manner would make it easier, not more difficult, for the Court to determine the applicable law. (See **Canida v. United States,** 250 F.2d 822, at 824 (5th Cir. January 1958); **Henderson v. United States,** 143 F.2d 681, at 684 (9th Cir. 1944); **Jacklin v. United States,** 231 F.2d 405 (9th Cir. 1956).)

We believe the Court erred in finding there was no merit in these specifications. The Court below instructed as to the language of the statute (U.S.C.

Title 47, Sections 153, 605) and gave a definition of a "wire communication" and the defined interception as set forth in the quoted portion in Appellants' brief at pages 100 and 101. The Court then discussed "divulgence" and "use" and defined those terms. No exception was taken or is urged as to the Court's definition of wire communication nor on the meaning or effect of divulgence, publishing or use. The only exception here was to the definition of "interception." The Court instructed that if a telephone conversation was listened to, either through the instrumentalities of electrical devices or through the human ear, and it was heard by another party, this was one meaning of the word "intercept." This, we believe, was plain error within the meaning of Rule 52 of the Federal Rules of Criminal Procedure. We again repeat that the Trial Court's position assumes interception and then argues that the means of such interception is immaterial. It assumes there is evidence in this case that the recordings could only have been obtained as they were "passing over" the wire. The defendant has no burden of proof in a criminal case. It is the Government's obligation to provide evidence of the fact of interception. It has attempted to do so by lifting itself by its boot straps. It says, "These tapes have telephone conversations. The participants did not consent to their being recorded. Therefore there must have been an 'interception'." This completely begs the question, "Was there an interception?" The test there is "How

were the tapes recorded?" By "interception" or by eavesdropping? The record is silent on this point.

Argument on Point 7: This Court erred in failing to reverse the conviction of defendants on all counts. We will not reiterate the arguments contained in the main brief. Since the Court in its opinion dealt only with Counts 1 and 2, we have directed our attention to only these counts in this petition for rehearing. The other counts were discussed in our main brief, and our objections are again urged.

CONCLUSION

May we respectfully point out (1) although defendants obtained "many" extensions of time for docketing the appeal, these were necessitated by the inability of the District Court court reporter to complete the transcript, due to the press of other business; (2) defendants' counsel were faced with the problem of writing, what they hoped would be, an intelligible brief covering 3,500 pages of testimony and various complex questions and attempted to do so in the manner most calculated to assist the Court in its determination of these questions. In the Government's comment, it apparently had no difficulty with any of the "non-compliances" commented on by this Court in its opinion (Appellee's brief, pages 54 to 57).

It is respectfully submitted that defendants' petition for rehearing should be allowed and the errors hereinbefore noted corrected.

Respectfully submitted,

WALTER H. EVANS, JR.,
BURTON J. FALLGREN,
Attorneys for Petitioners-Appellants.

CERTIFICATE OF COUNSEL

I, WALTER H. EVANS, JR., one of counsel for the defendants-appellants in the above cause, hereby certify that in my judgment the foregoing Petition for Rehearing is well founded and it is not interposed for delay.

Dated this 26th day of May, 1959.

WALTER H. EVANS, JR.,
Of Counsel for Appellants.